IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD C. GULEZIAN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DREXEL UNIVERSITY	:	**NO. 98-3004**

MEMORANDUM ORDER

Presently before the court is defendant's Motion for Reconsideration of the portion of the court's order of March 19, 1999 allowing plaintiff to proceed with his age discrimination claim.

Defendant essentially relies on two cases cited and discussed by the court in its memorandum of March 19, 1999 to argue that equitable tolling should not apply to the circumstances of bureaucratic delay which plaintiff confronted.

The first case is Robinson v. Dalton, 107 F.3d 1018 (3d Cir. 1997). That case did not involve the belated filing of an administrative charge. Rather, the plaintiff in that case never filed a charge regarding the claim at issue. Robinson did not involve bureaucratic delay. Rather, the case involved the reasonableness of plaintiff's alleged reliance on legal advice over the telephone from an EEOC employee plaintiff could not positively identify and on his failure to exercise due diligence to confirm such advice. Id. at 1023.

The Court in Robinson distinguished the circumstances presented from those in which a plaintiff was prevented from

filing a timely charge "by circumstances beyond his control." Id. at 1022. Where, as in the instant case, a plaintiff cannot get an earlier appointment with the EEOC and presents himself to the EEOC within the limitations period to complete a charge on the scheduled day only to be told the assigned official was too busy then to complete the charge, it fairly appears a formal charge was not timely filed due to circumstances beyond the plaintiff's control.

The second case is Kocian v. Getty Refining & Marketing Co., 707 F.2d 748 (3d Cir.), cert. denied, 464 U.S. 852 (1983). In that case, an EEOC officer drafted a charge and mailed it to the plaintiff after the limitations period expired. The Court declined to apply equitable tolling principles because of the plaintiff's lack of diligence after receiving the draft. The Court noted, however, that had Ms. Kocian promptly executed and returned the charge, it would have entertained an argument that she failed to file a timely charge "more because of bureaucratic delay than because of her own neglect." Id. at 754. The Court also noted "there is no allegation that the EEOC refused to process Ms. Kocian's charge when she initially visited the agency." Id. at 755 n.10.

These observations of the Court in Kocian are instructive. In the instant case, plaintiff visited the EEOC to file an administrative charge at a time scheduled by the agency

and within the limitations period. The EEOC did not process the charge because the assigned official had a backlog and was too busy. When the EEOC did complete the drafting of the charge and mailed it to plaintiff, he executed and returned it promptly. The untimeliness of plaintiff's charge was occasioned by bureaucratic delay beyond his control and not by neglect on his part.

It is true that plaintiff was represented by counsel. The issue, however, is not ignorance of the filing requirements but rather the operation of the administrative machinery. While it might have been prudent to proceed earlier, it was not neglectful or unreasonable to schedule an appointment on the 288th day for the purpose of filing an administrative charge on the 297th day. There has been no showing that a represented grievant was in any better position than an unrepresented one to overcome bureaucratic delay. The court will not vacate its memorandum and order of March 19th.

Defendant also requests "clarification" from the court as to "defendant's right to raise the issue again after discovery." It is the court that requires clarification.

Defendant filed a motion to dismiss the ADEA claim for failure to file a timely administrative charge. As noted in the court's March 19th memorandum, the ADEA charge clearly appeared to be timely from the allegations in the complaint. Plaintiff,

however, elected not to let the matter stand in that posture.

Plaintiff submitted an affidavit and several exhibits and asked that the motion be treated as one for summary judgment. Defendant did not object or ask for time to undertake further discovery into the circumstances surrounding the filing of an administrative charge as averred by plaintiff. Rather, defendant responded with a brief treating the motion as one for summary judgment, submitted its own exhibits and asked that a portion of plaintiff's affidavit be "disregarded in assessment of summary judgment" because it did not satisfy the "Rule 56(e) standard."

If defendant is asking whether it may rehash the issue on the record presented, it would not be availing for it to do so. If defendant is asking whether it may revisit the issue if a material question of fact about plaintiff's version of events were to arise from subsequently developed evidence, the court will not preclude defendant from presenting this in a motion for summary judgment at the conclusion of the authorized discovery period.

A court may entertain a successive summary judgment motion, particularly when the defendant has expanded the factual record on which summary judgment is sought. See, e.g., Whitford v. Boglino, 63 F.3d 527, 530 (7th Cir. 1995) (whether to allow renewed motions for summary judgment is matter of district court's discretion); Enlow v. Tishomingo County, 962 F.2d 501,

506-07 (5th Cir. 1992); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 913 (7th Cir. 1973), cert. denied, 417 U.S. 911, 94 S. Ct. 2610, 41 L. Ed.2d 215 (1974); Goss v. George Washington Univ., 942 F. Supp. 659, 661 (D.D.C. 1996); Stubblefield v. City of Jackson, 871 F. Supp. 903, 905 (S.D. Miss. 1994); United States v. Two A-37 Cessna Jets and their Equipment, 1994 WL 167998, *4 (W.D.N.Y. Apr. 20, 1994); Adley Express Co. v. Highway Truck Drivers and Helpers Local No. 107, 349 F. Supp. 436, 447 n.3. (E.D. Pa. 1972). Denial of a motion for summary judgment is not a final judgment and does not have res judicata effect. See, e.g. Whitford, 63 F.3d at 530.

ACCORDINGLY, this day of April, 1999, **IT IS HEREBY ORDERED** that defendant's Motion for Reconsideration (Doc. #9) is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.